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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 JUN 10 PM 2:30

JEANNE HICKS, CLERK

BY: Sequin

11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
12 IN AND FOR THE COUNTY OF YAVAPAI

13 STATE OF ARIZONA,

14 Plaintiff,

15 vs.

16 STEVEN CARROLL DEMOCKER,

17 Defendant.

) No. CR 2008-1339

) Div. 6

) **DEFENDANT'S RESPONSE TO**
) **STATE'S MOTION TO COMPEL**
) **MR. DEMOCKER TO PROVIDE**
) **THE STATE WITH THE**
) **PASSWORD TO A**
) **BLACKBERRY SEIZED FROM**
) **HIS UBS OFFICE**

(Oral Argument Requested)

20
21 Defendant Steven C. DeMocker, by and through counsel, hereby responds to the
22 State's Motion to compel him to provide it with the password to a Blackberry seized
23 from his UBS office.

24 **BACKGROUND**

25 On June 3, 2009 the State filed a Motion to compel Mr. DeMocker to provide the
26 State with the password to a Blackberry seized from his UBS office. On June 4th the
27 Court set oral argument on the Motion for June 23, 2009.
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ARGUMENT

The State asserts that Mr. DeMocker should be ordered to provide it with the password to a Blackberry found at his UBS office. The Court should deny the State's motion for three reasons: first, the State has not asserted how or why the information on the Blackberry is relevant to its investigation; second, the Arizona Rules of Criminal Procedure do not require a Defendant to disclose a password; and finally, such an order would violate Mr. DeMocker's rights under the Fifth Amendment to the United States Constitution.

The State has not articulated how or why information from the Blackberry is relevant to its investigation. The State's motion asserts only that "the information may be critical to the advancement and completion of the State's on-going investigation" The State has been investigating this case for almost a year - it has reviewed Mr. DeMocker's home and office computers as well as his home, office and cell phone records, it has interviewed Mr. DeMocker and several others on multiple occasions. The State points to no results of its extensive and seemingly myopic investigation that lead it to reasonably suspect that there is any relevant information on the Blackberry. The State's Motion should be denied because it has failed to demonstrate how any information on the Blackberry is relevant.

Additionally, the State's Motion should be denied because Arizona Rule of Criminal Procedure 15.2 limits what disclosure is required by a Defendant. The rule does not require a defendant to provide the State with any passwords or other evidence in the nature of a password. In fact, the rule requires only that the Defendant do the following: (1) appear in a line-up; (2) speak for identification by witnesses; (3) be fingerprinted, palm-printed, footprinted or voiceprinted; (4) pose for photographs not involving reenactment of an event; (5) try on clothing; (6) permit the taking of samples of his or her hair, blood, saliva, urine or other specified materials that involves no

1 unreasonable intrusions of his or her body; (7) provide specimens of his or her
2 handwriting; and (8) submit to a reasonable physical or medical inspection of his or
3 her body, provided such inspection does not include psychiatric or psychological
4 examination. *See* Ariz. R. Crim. Pro. 15.2. The Rule does not require Mr. DeMocker to
5 disclose or otherwise provide passwords or similar information to the State.

6 Lastly, the State's Motion should be denied because Mr. DeMocker is also
7 entitled to Fifth Amendment protection with respect to the Blackberry password. The
8 Fifth Amendment to the United States Constitution protects "a person ... against being
9 incriminated by his own compelled testimonial communications." *Fisher v. United*
10 *States*, 425 U.S. 391, 409, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). Mr. DeMocker's
11 provision of a password is testimonial as it may provide the State with evidence of
12 authentication. "'The act of production' itself may implicitly communicate 'statements
13 of fact.' By 'producing documents in compliance with a subpoena, the witness would
14 admit that the papers existed, were in his possession or control, and were authentic.'" *United States v. Hubbell*, 530 U.S. 27, 36 (2000) (quoting *Doe v. United States*, 487
15 U.S. 201, 209 (1988) ("*Doe II*")). Thus, "the Fifth Amendment applies to acts that
16 imply assertions of fact." *Doe II*, 487 U.S. at 209. It is "the attempt to force [an
17 accused] to 'disclose the contents of his own mind' that implicates the Self-
18 Incrimination Clause." *Id.* at 211 (quoting *Curcio v. United States*, 354 U.S. 118, 128
19 (1957)). Moreover, "[c]ompelled testimony that communicates information that may
20 'lead to incriminating evidence' is privileged even if the information itself is not
21 inculpatory." *Hubbell*, 530 U.S. at 38 (quoting *Doe II*, 487 U.S. at 208, n .6). Mr.
22 DeMocker's provision of a password would "implicitly authenticate" the information on
23 the Blackberry. Thus, the State's requested relief, an order compelling production of
24 the password to his Blackberry, would violate the Fifth Amendment. The Court should
25 therefore deny the State's Motion on this ground as well.
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CONCLUSION

For these reasons, and any evidence adduced at the hearing on this matter, Mr. DeMocker requests that the Court deny the State's motion.

DATED this 10th day of June, 2009.

By: 

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ORIGINAL of the foregoing filed
this 10th day of June, 2009, with:

Jeanne Hicks,
Clerk of the Court
Yavapai County Superior Court
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Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 10th day of June, 2009, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
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